

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Committee Substitute

for

Senate Bill 621

BY SENATORS TAKUBO AND DEEDS

[Originating in the Committee on the Judiciary;

reported on February 17, 2023]

1 A BILL to amend and reenact §49-4-601 of the Code of West Virginia, 1931, as amended, relating
2 to service of parties in child abuse and neglect matters; requiring the sheriff to serve the
3 abuse and neglect petition and notice of a preliminary hearing without compensation;
4 clarifying the procedure for notices of subsequent hearings and service via publication;
5 and exempting the sheriff from further obligations to provide service, mailings, or
6 publications after serving the petition and notice of preliminary hearing.

Be it enacted by the Legislature of West Virginia:

ARTICLE 4. COURT ACTIONS.

§49-4-601. Petition to court when child believed neglected or abused; venue; notice; right to counsel; continuing legal education; findings; proceedings; procedure.

1 (a) *Petitioner and venue.* — If the department or a reputable person believes that a child
2 is neglected or abused, the department or the person may present a petition setting forth the facts
3 to the circuit court in the county in which the child resides, or if the petition is being brought by the
4 department, in the county in which the custodial respondent or other named party abuser resides,
5 or in which the abuse or neglect occurred, or to the judge of the court in vacation. Under no
6 circumstance may a party file a petition in more than one county based on the same set of facts.

7 (b) *Contents of Petition.* — The petition shall be verified by the oath of some credible
8 person having knowledge of the facts. The petition shall allege specific conduct including time
9 and place, how the conduct comes within the statutory definition of neglect or abuse with
10 references to the statute, any supportive services provided by the department to remedy the
11 alleged circumstances, and the relief sought. Each petition shall name as a party each parent,
12 guardian, custodian, other person standing in loco parentis of or to the child allegedly neglected
13 or abused and state with specificity whether each parent, guardian, custodian, or person standing
14 in loco parentis is alleged to have abused or neglected the child.

15 (c) *Court action upon filing of petition.* — Upon filing of the petition, the court shall set a
16 time and place for a hearing and shall appoint counsel for the child. When there is an order for

17 temporary custody pursuant to this article, the preliminary hearing shall be held within 10 days of
18 the order continuing or transferring custody, unless a continuance for a reasonable time is granted
19 to a date certain, for good cause shown.

20 (d) *Department action upon filing of the petition.* — At the time of the institution of any
21 proceeding under this article, the department shall provide supportive services in an effort to
22 remedy circumstances detrimental to a child.

23 (e) *Notice of hearing.* —

24 (1) The petition and notice of the preliminary hearing shall be served by the sheriff's office,
25 without compensation, upon both parents and any other guardian, custodian, or person standing
26 in loco parentis, giving to the persons at least five days' actual notice ~~of a preliminary hearing and~~
27 ~~at least 10 days' notice of any other hearing.~~ Notice of any other hearing shall give the persons
28 at least 10 days' notice or the notice as otherwise required by rules promulgated by the Supreme
29 Court of Appeals.

30 (2) Notice shall be given to the department, any foster or pre-adoptive parent, and any
31 relative providing care for the child.

32 (3) In cases where personal service within West Virginia cannot be obtained by the
33 sheriff's office after due diligence upon any parent or other custodian, a copy of the petition and
34 notice of the preliminary hearing shall be mailed to the person by certified mail, addressee only,
35 return receipt requested, to the last known address of the person as directed by the court:
36 Provided, That the sheriff's office is not responsible for the certified mailing. If the person signs
37 the certificate, service is complete and the certificate shall be filed as proof of the service with the
38 clerk of the circuit court.

39 (4) If service of the petition and notice of the preliminary hearing cannot be obtained by
40 personal service or by certified mail, notice shall be by publication as a Class II legal
41 advertisement in compliance with §59-3-1 *et seq.* of this code: Provided, That the sheriff's office
42 is not responsible for the publication of the Class II legal advertisement.

43 (5) A notice of hearing shall specify the time and place of the hearings, the right to counsel
44 of the child, parents, and other guardians, custodians, and other persons standing in loco parentis
45 with the child and the fact that the proceedings can result in the permanent termination of the
46 parental rights.

47 (6) Failure to object to defects in the petition and notice may not be construed as a waiver.

48 (f) *Right to counsel.* —

49 (1) In any proceeding under this article, the child shall have counsel to represent his or
50 her interests at all stages of the proceedings.

51 (2) The court's initial order shall appoint counsel for the child and for any parent, guardian,
52 custodian, or other person standing in loco parentis with the child if such person is without retained
53 counsel.

54 (3) The court shall, at the initial hearing in the matter, determine whether persons other
55 than the child for whom counsel has been appointed:

56 (A) Have retained counsel; and

57 (B) Are financially able to retain counsel.

58 (4) A parent, guardian, custodian, or other person standing in loco parentis with the child
59 who is alleged to have neglected or abused the child and who has not retained counsel and is
60 financially unable to retain counsel beyond the initial hearing, shall be afforded appointed counsel
61 at every stage of the proceedings.

62 (5) Under no circumstances may the same attorney represent both the child and another
63 party. The same attorney may not represent more than one parent or custodian: *Provided*, That
64 one attorney may represent both parents or custodians where both parents or custodians consent
65 to this representation after the attorney fully discloses to the client the possible conflict and where
66 the attorney advises the court that she or he is able to represent each client without impairing her
67 or his professional judgment. If more than one child from a family is involved in the proceeding,
68 one attorney may represent all the children.

69 (6) A parent who is a co-petitioner is entitled to his or her own attorney.

70 (7) The court may allow to each attorney appointed pursuant to this section a fee in the
71 same amount which appointed counsel can receive in felony cases.

72 (8) The court shall, sua sponte or upon motion, appoint counsel to any unrepresented
73 party if, at any stage of the proceedings, the court determines doing so is necessary to satisfy the
74 requirements of fundamental fairness.

75 (g) *Continuing education for counsel.* — Any attorney representing a party under this
76 article shall receive a minimum of eight hours of continuing legal education training per reporting
77 period on child abuse and neglect procedure and practice. In addition to this requirement, any
78 attorney appointed to represent a child must first complete training on representation of children
79 that is approved by the administrative office of the Supreme Court of Appeals. The Supreme Court
80 of Appeals shall develop procedures for approval and certification of training required under this
81 section. Where no attorney has completed the training required by this subsection, the court shall
82 appoint a competent attorney with demonstrated knowledge of child welfare law to represent the
83 parent or child. Any attorney appointed pursuant to this section shall perform all duties required
84 of an attorney licensed to practice law in the State of West Virginia.

85 (h) *Right to be heard.* — In any proceeding pursuant to this article, the party or parties
86 having custodial or other parental rights or responsibilities to the child shall be afforded a
87 meaningful opportunity to be heard, including the opportunity to testify and to present and cross-
88 examine witnesses. Foster parents, pre-adoptive parents, and relative caregivers shall also have
89 a meaningful opportunity to be heard.

90 (i) *Findings of the court.* — Where relevant, the court shall consider the efforts of the
91 department to remedy the alleged circumstances. At the conclusion of the adjudicatory hearing,
92 the court shall make a determination based upon the evidence and shall make findings of fact
93 and conclusions of law as to whether the child is abused or neglected and whether the respondent
94 is abusing, neglecting, or, if applicable, a battered parent, all of which shall be incorporated into

95 the order of the court. The findings must be based upon conditions existing at the time of the filing
96 of the petition and proven by clear and convincing evidence.

97 (j) *Priority of proceedings.* — Any petition filed and any proceeding held under this article
98 shall, to the extent practicable, be given priority over any other civil action before the court, except
99 proceedings under §48-27-309 of this code and actions in which trial is in progress. Any petition
100 filed under this article shall be docketed immediately upon filing. Any hearing to be held at the
101 end of an improvement period and any other hearing to be held during any proceedings under
102 this article shall be held as nearly as practicable on successive days and, with respect to the
103 hearing to be held at the end of an improvement period, shall be held as close in time as possible
104 after the end of the improvement period and shall be held within 30 days of the termination of the
105 improvement period.

106 (k) *Procedural safeguards.* — The petition may not be taken as confessed. A transcript or
107 recording shall be made of all proceedings unless waived by all parties to the proceeding. The
108 rules of evidence shall apply. Following the court's determination, it shall ask the parents or
109 custodians whether or not an appeal is desired and the response transcribed. A negative
110 response may not be construed as a waiver. The evidence shall be transcribed and made
111 available to the parties or their counsel as soon as practicable, if the transcript is required for
112 purposes of further proceedings. If an indigent person intends to pursue further proceedings, the
113 court reporter shall furnish a transcript of the hearing without cost to the indigent person if an
114 affidavit is filed stating that he or she cannot pay the transcript.